UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KRISTIN SMITH, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 00-93-P-H***
	)	
RELIANCE NATIONAL INDEMNITY CO.,	***)***	
	)	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The defendant, Reliance National Indemnity Company, seeks summary judgment on Count I of the complaint in this action which was removed from the Maine Superior Court (Cumberland County). The plaintiffs, Kristin Smith and Joan Stack,[1] seek summary judgment on liability under Count I. I recommend that the court grant the defendant's motion and deny the motion of the remaining plaintiffs; under the circumstances of this case, granting the defendant's motion, despite its title, will be dispositive of the entire action.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as

[1] Initially, the plaintiffs in this action included Paula Smith, mother of Kristin Smith. Complaint, attached to Notice of Removal of Defendant Reliance National Indemnity Co. (Docket No. 1), ¶¶ 1, 7. After the defendant's motion for partial summary judgment was filed, the parties filed a stipulation of dismissal of Paula Smith's claims under Count I and all of Count II, the only other count in the complaint. Partial Stipulation of Dismissal (Docket No. 10) at 1. As a result, Paula Smith is no longer a party to this action.

to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine

issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

II. Factual Background

Kristin Smith was a resident of Cumberland, Maine on October 2, 1998. Defendant Reliance National Indemnity Company Statement of Material Facts ("Defendant's SMF") (Docket No. 7) ¶ 1; Plaintiffs' Opposing Statement of Material Facts ("Plaintiffs' Responsive SMF") (Docket No. 9) ¶ 1. On that date, Smith was a student at Greeley High School and the youth representative to the Coordinating Council of the Maine Conference of the United Church of Christ. *Id*. ¶¶ 2-3. The Maine Conference of the United Church of Christ is a non-profit Maine corporation that serves as the umbrella organization for Congregational churches in the State of Maine. *Id*. ¶ 19. It owns real property at various locations throughout the state. *Id*. It is the named insured on a policy of insurance issued through the participating churches of the Conference of the United Church of Christ's Board's property and casualty insurance program. *Id*. ¶ 20. That policy, issued by the defendant, bears the policy number NKA-0133862-01, *id*. ¶ 21, and is the subject of this declaratory judgment action.

Smith had taken a leave from Greeley High School on the morning of October 2, 1998 to attend a meeting of the Coordinating Council in Windham, Maine. *Id*. ¶ 4. After attending the meeting she left to drive back to school in a Ford Taurus owned by her mother. *Id*. ¶¶ 5-6. On her way back to school Smith was involved in a motor vehicle accident with a pick-up truck operated by Linda Stevens in which plaintiff Joan Stack was a passenger. *Id*. ¶¶ 7-8. Stack received serious personal injuries in the accident. *Id*. ¶ 8. Immediately after the accident, Smith's mother notified her insurance company, Allstate, by telephone. *Id*. ¶ 10.

On December 17, 1999 Stack executed a document entitled "Release and Indemnity Agreement," a copy of which is attached to the complaint as Exhibit E.[2] That document acknowledges the receipt of $200,000 and releases Smith, her parents, and Allstate from any and all claims arising out of the October 2, 1998 accident, except for claims to be raised in the declaratory judgment action now before this court. Release and Indemnity Agreement ¶¶ 1, 6. Stack agreed to limit her claim for additional damages "to the extent that such damages and defense costs would be covered by" the insurance at issue in this proceeding. *Id*. ¶ 6(b). Allstate contributed $100,000 of the $200,000 paid to Stack; this was the applicable limit of liability coverage in its policy. Defendant's SMF ¶¶ 12-13; Plaintiffs' Responsive SMF ¶¶ 12-13.

Prior to filing this action the plaintiff inquired about the availability of coverage under the insurance policies obtained by the Maine Conference of the United Church of Christ. *Id*. ¶ 25. The defendant in this action first received notice of the automobile accident when this suit was filed in March 2000. *Id*. ¶ 28.

III. Discussion

A. Notice

The policy at issue provides, in relevant part:

> 2. Duties in the Event of Accident, Claim, Suit or Loss
>
> a. In the event of an "accident," claim, "suit" or "loss," you must give us or our authorized representative prompt notice of the "accident" or "loss" including:
>
> (1) How, when and where the "accident" or "loss" occurred;
>
> (2) The "insured's" name and address; and
>
> (3) To the extent possible, the names and addresses of any injured persons and witnesses.
>
> b. Additionally, you and any other involved "insured" must:

[2] The document provided to the court is not certified, but both parties rely on it and neither has objected to it on this basis. The court accordingly will consider it, but counsel are reminded that documents upon which a party intends to rely in connection with a motion for summary judgment should be certified or sworn.

> (1) Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost;
> (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit."

Participating Churches of the Conferences of United Church of Christ Insurance Board's Property and Casualty Insurance Program, Church No. W0500, Named Insureds: Maine Conference of the United Church of Christ, Policy Period From: January 1, 1998 To: January 1, 1999, Commercial Automobile Coverage Part ("Policy") Exh. B to Complaint, Section IV(A)(2).

The defendant contends that timely notice to the insurer "is well recognized as a condition precedent to the availability of coverage," Memorandum of Law in Support of Defendant's Motion for Partial Summary Judgment ("Defendant's Motion"), submitted with Defendant Reliance National Indemnity Company's Motion for Partial Summary Judgment, etc. (Docket No. 6), at 8, and that plaintiff Smith's failure to notify the defendant of the claim until suit was filed in March 2000, some 17 months after the accident, is a breach of the insurance contract barring any recovery. The defendant's characterization of Maine law on this issue is not entirely accurate. The case law cited by the defendant states that an insurer must be provided with a meaningful opportunity to defend its interests, *Jacques v. American Home Assurance Co.*, 609 A.2d 719, 721 (Me. 1992), and that an insurer not notified until three years after the accident at issue had been prejudiced by the late notice to the degree that the claim was barred, *Home Ins. Co. v. Horace Mann Ins. Co.*, 603 A.2d 860, 861 (Me. 1992). The plaintiffs' response to this argument is an assertion that the defendant cannot have been prejudiced by the delay in its receipt of notice of Stack's claim because Stack reserved the right in the settlement agreement to file suit against plaintiff Smith and pursue additional damages to the extent such damages are covered by the defendant's policy, the defendant would not have been able to obtain an independent medical examination of plaintiff Stack any earlier because no lawsuit had been

filed, the defendant may still investigate the accident, and liability was denied by plaintiff Smith in the settlement agreement. Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Memorandum"), submitted with Plaintiffs' Objection to Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment, etc. (Docket No. 8), at 6-8.

The plaintiffs' position that the settlement agreement is not really a settlement that binds the defendant in any way because Stack may file suit against Smith if this court determines that there is coverage under the insurance policy at issue is undermined by two facts. First, the position is inconsistent with the complaint's demand for reimbursement of the $100,000 already paid to Stack by Smith. Complaint at [6], paragraph (c). Second, Smith's interest in such a proceeding would not be adverse to Stack's because she no longer has any potential personal liability due to the settlement agreement. There would certainly be some prejudice to the defendant inherent in a situation in which it is in Smith's interest to ensure that Stack is awarded at least $200,000 in damages so that Smith can be reimbursed in full by the defendant for the money she has already paid to Stack.

The prejudice to the defendant from not being able to obtain an independent medical evaluation of Stack during a 17 month period following the accident is not tied to the availability of such an examination after suit is filed, pursuant to M. R. Civ. P. 35 of Fed. R. Civ. P. 35. An injured plaintiff may well submit voluntarily to such an examination upon request for any number of reasons. There is no evidence in the summary judgment record to suggest that Stark would have refused such a request.

Any investigation of the accident that begins 17 months after the event must necessarily be hampered by that passage of time. Witnesses, if still available, may not remember the events as clearly as they would have months earlier. The intersection where the accident occurred may have

changed. Both the investigating officer, if any, and evidence gathered at the scene at the time of the accident, if any, may no longer be available.

Finally, most written settlements include a denial of liability or responsibility by the paying party. Such agreements are nonetheless enforceable against them and, in the absence of other considerations, against their insurers as well.

That being said, it remains the defendant's burden to demonstrate that it has been prejudiced by the delayed notice. *Franco v. Selective Ins. Co.*, 184 F.3d 4, 7 (1st Cir. 1999); *Ouellette v. Maine Bonding & Cas. Co.*, 495 A.2d 1232, 1235 (Me. 1985); *but see Horace Mann*, 603 A.2d at 861 ("[a]ssuming, without deciding" that insurer must show that it has been prejudiced by failure to comply with notice requirement of policy). Here, the defendant has not provided any evidence concerning the nature or extent of Stack's claimed injuries, so that the court could evaluate its claim of prejudice resulting from the lack of opportunities to have her examined by physicians of its own choice, nor has it identified aspects or elements of an investigation of the accident that it would have undertaken had earlier notice been provided but which it could not undertake 17 months later or how the lack of such information has caused it prejudice. The Law Court's most recent statement on this issue, the opinion in *Horace Mann*, does not identify "the evidence of prejudice from the late notice presented by Horace Mann in support of its motion for summary judgment." 603 A.2d at 861.

In the absence of such evidence in this case, I am reluctant to conclude that the Law Court would find that a 17-month delay in providing notice of an accident to an insurer, standing alone, causes sufficient prejudice to the insurer to bar recovery under an insurance policy as a matter of law. In any event, it is not necessary to resolve this issue because I conclude, as set forth below, that Smith is not an insured under the policy at issue and Stark accordingly cannot recover from the defendant.

B. Coverage

Smith bases her claim on the contention that she is an "insured" under the terms of the policy at issue. Plaintiffs' Memorandum at 2-6. The relevant policy language provides:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

Policy, Section II(A). The definition of "insured" on which the plaintiffs rely, Plaintiffs' Memorandum at 3, provides:

> Who Is an Insured
> The following are "insureds.":
> a. You for any covered "auto."

Policy, Section 11(A)(1). The policy states that any auto is a covered auto. *Id*. § 1(A)(1) & Commercial Automobile Coverage Part, Schedule of Coverages, at L1. The policy also states that "[t]hroughout this coverage part the words 'you' and 'your' refer to the Named Insured[3] shown in the Memorandum of Coveage [sic]." *Id.*, Business Automobile Coverage Form, at L5. Although they are not so titled on the copies provided to the court, the defendant refers to the first three pages of the policy as the memorandum of coverage, Defendant's Memorandum at 6, and the plaintiffs apparently do not dispute this characterization. On the first page of the portions of the policy provided to the court, the Maine Conference of the United Church of Christ is identified as the Named Insureds [sic]. Policy, Exh. A to Complaint, at [1].

The plaintiffs admit that the Maine Conference of the United Church of Christ is a corporation. Defendant's SMF ¶ 19; Plaintiffs' Responsive SMF ¶ 19. Ordinarily, an automobile liability

[3] The plaintiffs refer to the principle that ambiguities in an insurance policy must be resolved against the insurer and in favor of coverage. Plaintiffs' Memorandum at 5; *see Twombly v. AIG Life Ins. Co.*, 199 F.3d 20, 23 (1st Cir. 1999). It is not at all clear which, if any, of the terms of the insurance policy at issue the plaintiffs contend is ambiguous. To the extent that the plaintiffs mean to argue that the policy's definition of the "named insured" is ambiguous, that assertion is incorrect. *See, e.g., Sheppard v. Allstate Ins. Co.*, 21 F.3d (continued…)

insurance policy on which a corporation is the sole named insured will not extend coverage to officers or employees of the corporation. *E.g., Jacobs v. United States Fidelity & Guar. Co.*, 627 N.E.2d 463, 465 (Mass. 1994); *Sproles v. Greene*, 407 S.E.2d 497, 500 (N.C. 1991); *Cutter v. Maine Bonding & Cas. Co.*, 579 A.2d 804, 807 (N.H. 1990); *Buckner v. Motor Vehicle Accident Indemnification Corp.*, 486 N.E.2d 810, 811 (N.Y. 1985). Here, the plaintiffs contend that the Maine Conference "*is* its conferring members," Plaintiffs' Memorandum at 3, and that Smith, as a member, is accordingly a named insured. Assuming that Smith is a member of the Maine Conference, the plaintiffs nonetheless cite no authority for the proposition that a member of a named corporate insured, most analogous to a corporate director, *id*. at 5, is thereby also a named insured for the purposes of an insurance policy that lists only the corporation as a named insured. Such an interpretation would expand coverage beyond that which could reasonably have been expected by the insurer and, in the case of an organization whose membership is subject to frequent changes, to a group the parameters of which the insurer would be unlikely to be able to know. A corporation exists as a separate legal entity for many reasons; those who operate the corporation may not take advantage of that legal form when it suits their convenience and avoid its restrictions when it does not. *See generally Giambri v. Government Employees Ins. Co.*, 405 A.2d 872, 873 (N.J.Super. 1979).

The plaintiffs cite two cases in support of their argument, Plaintiffs' Memorandum 6, but neither provides much support. In *Thattil v. Dominican Sisters of Charity of the Presentation of the Blessed Virgin, Inc.*, 613 N.E.2d 908 (Mass. 1993), a 4-3 majority of the Massachusetts Supreme Judicial Court held that a member of a religious order who was struck by an underinsured motorist while she was walking could recover under an automobile insurance policy on which the incorporated order was the named insured because the member had "merged her identity with that of the Order" by

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1010, 1012 (10th Cir. 1994); *Rosenberg v. Zurich Am. Ins. Co.*, 726 N.E.2d 29, 33 (Ill. App. 2000).

renouncing her right to material goods and recognizing that everything belonged to the order. *Id*. at 912. It was impossible for the member to buy underinsurance coverage in a personal policy and the insurer, which was aware of these unique circumstances, had not informed the members of the order that they did not have full personal coverage or that they could purchase additional personal coverage. *Id*. The opinion repeatedly emphasizes the unique factual circumstances of the case, *id*. at 912, 913, as do later opinions of Massachusetts courts distinguishing it, *e.g., Andrade v. Aetna Life & Cas. Co.*, 617 N.E.2d 1015, 1018 (Mass. App. 1993); *Tatarian v. Commercial Union Ins. Co.*, 672 N.E.2d 997, 999 (Mass. App. 1996). In the present case, Smith had personal insurance and there is no suggestion that she had renounced her right to material goods in favor of the Maine Conference. Both Smith and Stack had insurance options not available to the plaintiff in *Thattil*. Even if this court were to assume that the Maine Law Court would adopt the holding in *Thattil*, that opinion is clearly limited to its unique facts and not applicable to the factual situation presented by the instant case.

The other case upon which the plaintiffs rely, Plaintiffs' Memorandum at 6, is *Grain Dealers Mut. Ins. Co. v. McKee*, 911 S.W.2d 775 (Tex. App. 1995), in which an intermediate court held that the daughter of the sole shareholder of a family corporation that was the named insured could recover under the underinsured motorist provisions of an automobile liability policy, *id*. at 781. However, the Texas Supreme Court overturned this holding on appeal, on precisely this point. *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 456 (Tex. 1997). Accordingly, the lower court's opinion provides no support for the plaintiffs' position here. Even if that were not the case, the lower court's opinion was based on policy language extending coverage to members of the family of the insured, and Smith cannot be considered a member of the "family" of the corporate insured in this case, which is not a family-owned corporation. The lower court's opinion would be distinguishable even if it had not been overturned on appeal.

Finally, the plaintiffs argue that a finding that Smith is not an insured for purposes of this claim will "work a manifest injustice," allowing the defendant, which accepted a premium for the policy, to take the position that "there can be no coverage." Plaintiffs' Memorandum at 4. To the extent that the plaintiffs mean to contend that the policy provides no coverage whatsoever because a corporation cannot operate a motor vehicle, that contention is factually incorrect. The policy provides coverage other than that sought by the plaintiffs here to other individuals in certain circumstances. For example, volunteers and employees are defined as "insureds" for the purpose of automobile liability coverage under certain circumstances, Policy, Section II(A)(1)(d) & (e); medical payments coverage is provided for individuals injured while occupying a covered auto, *id*. Auto Medical Payments Coverage, ¶¶ A & B(3), at L18; and uninsured motorists coverage is provided for individuals injured while occupying a covered auto, *id*. Uninsured Motorists Coverage, ¶¶ A & B(3), at L20. The policy is not a nullity. *Andrade*, 617 N.E.2d at 1018; *General Ins. Co. of Am. v. Icelandic Builders, Inc.*, 604 P.2d 966, 968 (Wash.App. 1979). It simply does not provide the coverage sought by the plaintiffs in this case.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for partial summary judgment be **GRANTED** and that the plaintiffs' motion for partial summary judgment be **DENIED**. As a practical matter, granting the defendant's motion, which seeks summary judgment on Count I of the complaint, will result in a final disposition of this action, in which only a portion of Count I remains active following the stipulation of dismissal filed by the parties on August 4, 2000.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 18th day of September, 2000.

David M. Cohen
United States Magistrate Judge

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JOAN STACK plaintiff	GEORGE W. BEALS (See above) [COR LD NTC]
v.	
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